IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO.5352 OF 2004

WITH

CRIMINAL MISC.APPLICATION NO.107 OF 2005

Hasina Salim Khan ...Applicant

Versus

The State of Maharashtra ...Respondent

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Mr.M.S.Adenwala for Applicant.

Mr.D.R.More, A.P.P. for Respondent.

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CORAM: A.M.KHANWILKAR, J.

FEBRUARY 18, 2005.

P.C.

1. Heard Counsel for the parties. Before I proceed to examine teh arguments as canvassed, it is relevant to mention that while this Bail Application was pending in this Court, charge-sheet came to be filed before the Trial Court. At the outset, the Applicant was given option to move the Trial Court as charge-sheet has since been filed.

However, Counsel for the Applicant, on instructions, stated that the Applicant was not interested in going back to the Trial Court, but would pursue his present application on merits. On that basis, he has advanced the contentions on merits and invited decision from this Court.

2. The Applicant has been arrested in connection with C.R.No.142 of 2004 registered with Narcotic Cell for offences punishable under Section 8(c), 20 and 29 the N.D.P.S. Act. The prosecution case is that on information received that two lady accused namely Applicant and her companion whose description was provided, were carrying ganja to their customers. On the basis of that information, the raiding party left for the spot where the Applicant as well as her companion, were accosted together. Thereafter, on complying necessary formalities, search of both the accosted persons was taken, when 13 kg of ganja was recovered from the present Applicant and 12 kg was recovered from the companion of the Applicant. The Applicant preferred bail application before the Trial Court, which has been rejected on invoking rigours of

Section 37 of the N.D.P.S. Act on the reasoning that the total quantity seized from both the persons arrested together will have to be reckoned and which comes to 25 kgs. which is far in excess of the commercial quantity i.e. 20 kgs. As there is sufficient material to indicate complicity of the Applicant, her bail application came to be rejected.

3. In the present bail application, three contentions have been raised on behalf of the Applicant. The first argument is that the search of the Applicant was taken by Head Constable No.204 Palaskar. It is argued that she had no power to cause search of the Applicant being Head Constable inasmuch as only Officer specified by Section 42(1) is competent to carry out search being an Officer who is superior in rank to a peon, sepoy or constable of Police Department. Whereas, the said lady was only Head Constable and not superior Officer as was required. This submission is countered by the learned A.P.P. on the argument that if the arrest panchnama is read as a whole, it clearly indicates that the said Police Officer HC

204 Palaskar did not cause search in exercise of powers under Section 43 of the Act, but was required to carry out the search on instructions of her superior who was the Gazetted Officer in terms of Section 50(4) of the Act. On reading the panchnama as a whole, there is substance in the argument of the learned A.P.P. that the search carried out by HC 204 Palaskar was not in exercise of powers under Section 43 as such, but being a female, called upon to search the accused/Applicant who is a female, on instructions of the Gazetted Officer in exercise of powers under Section 50 of the Act. If it is so, there is no substance in the argument of the Applicant that the search of the Applicant as was undertaken, violates mandate of Section 43 of the Act.

4. The second argument canvassed before this Court is that there is violation of requirement of Section 50(4) of the Act, inasmuch as the Applicant was not searched in a secluded place. This submission clearly overlooks the contents of the panchnama which spells out that all the requisite formalities for observing mandate of Section 50

have been complied with at the relevant time. The in-charge of the raiding party himself was the Gazetted Officer. He has informed each of the accused about there right of search. The Applicant as well as the other accused, in turn, waived their right to be searched before another Gazetted Officer. The panchnama also records that as the accused/Applicant is female, was required to be searched by a female. The panchnama also records that the Applicant was searched in a secluded place by a female. The only female person at the relevant time was HC 204 Palaskar. Viewed in this perspective, there is no substance in the argument that there was non-observance of Section 50(4) of the Act as is contended. Counsel for the Applicant places reliance on the decision of our High Court reported in **1997(2) Mh.L.J. 337 in the case of Veneela Tilak vs. Shahasane, Assistant Collector of Customs & Anr.** to contend that calling female Officer to search the accused would not fulfil the legislative intent. The prosecution case is that at the relevant time, no other female was available, who could have taken search of the Applicant. Whether that case should be accepted or

discarded cannot be examined at this stage, but is matter for trial. If the prosecution establishes the fact that at the relevant time, no other female was available for taking search and under compelling circumstances, HC 204 Palaskar was required to carry out the search, in that case, there can be no infirmity in the procedure as adopted. Whether the version of the said witness can be accepted, is also matter for trial. For the time being, the panchanama as recorded, will have to be accepted as it is and if so read, it is not possible to take the view that there has been infraction of Section 50(4) of the Act. The reported case relied upon by the Applicant is a matter where evidence was led in at the time of the trial and that evidence came up for scrutiny before the Court. In the circumstances, even this submission does not commend to me.

5. It is lastly contended that there is nothing on record to suggest that the Applicant was found discussing matters with the companion, so as to involve the Applicant by virtue of Section 29 of the Act. The prosecution case as is seen from the

evidence already collected during the investigation is that both women were accosted together and were found moving together with ganja in the quantity of 13 kg and 12 kg respectively. No fault can be found with the approach of the lower Court in reckoning the said ganja recovery from both the accused together at this stage. It is not possible to accept the stand of the Applicant that she had no causal connection with her companion, who has been arrested along with her when she was moving together with her. That will be the matter for trial. Accordingly, even this submission does not commend to me.

6. In other words, the lower Court has rightly applied Section 37 of the Act on the reasoning that the quantity found from both the accused together was exceeding 25 kgs, which is commercial quantity. In my opinion, it is not possible to take the view that there is reason to believe that the Applicant is not guilty of the alleged offence. If it is so, it is not a case for bail. Hence, rejected.

7. Needless to observe that any observation made in this order, shall not influence the Trial Court at the final hearing of the trial, which will have to be decided on its own merits, in accordance with law.

8. In view of the above order, no further orders are necessary on Criminal Misc.Application No.107 of 2005. The same is disposed of.

A.M.KHANWILKAR, J.